U.S. House of Representatives
Committee on Financial Services
2129 Rayburn House Office Building
Washington, DC 20515

March 17, 2003

Office of the Rules Docket Clerk
Office of General Counsel
Room 10276
Department of Housing and Urban Development
451 Seventh Street, SW
Washington, DC 20410-0500

Re: Comments on Proposed Rule on "Participation in HUD Programs by Faith-Based Organizations; Providing for Equal Treatment of All HUD Program Participants" [24 CFR Parts 92, 570, 572, 574, 576, 582, 583, and 585; Doc. No. FR-4782-P-01]

We write to submit comments regarding the Proposed Rule on "Participation in HUD Programs by Faith-Based Organizations; Providing for Equal Treatment of All HUD Program Participants" ("Proposed Rule"), published by the Department of Housing and Development ("HUD") on January 6, 2003. As written, the proposed rule is bad policy, poorly constructed, and inconsistent with the laws and Constitution of the United States. We urge HUD to revise its Proposed Rule as detailed below and to delay its implementation until the substantial issues of concern presented in this comment may be examined and addressed by the Congress of the United States.

I. Introduction

We support the critical work performed by religious charities with government aid under existing federal law. HUD has given billions of dollars to hundreds of religious groups to provide social services, and most of them do an excellent job helping people without practicing discrimination or attempting to use government funds to inculcate a particular religious belief.

The primary change accomplished by the proposed rule – allowing religious discrimination in the employment of persons to work in federally-funded secular housing programs – is not practiced by the great majority of religious charities who seek federal funding and is not something most of them seek.

We support other elements of the proposal, such as allowing religious charities to take federal funds without removing religious terms in their name or removing symbols from their walls. In fact, these proposals re-state existing law as practiced by this and past Administrations. While in a few instances, officials have inappropriately insisted to the contrary, these decisions can be corrected by agencies and generally have been in the past. We supported these principles in the past and support their reaffirmation here.

Given the facts, that under existing law, billions have been provided to charitable religious organizations to carry out their work, we believe part of the title of the Proposed Rule ("Providing for Equal Treatment of All HUD Program Participants") mischaracterizes the actual impact of the Proposed Rule. The major effect of the Proposed Rule as drafted is actually to confer "special rights" on these organizations, namely the right to engage in various forms of federally-funded employment discrimination that other HUD grantees cannot do.

The Administration has acknowledged that some forms of discrimination are allowed and has implied that other forms would not be. But the HUD's Proposed Rule is ambiguous as to what discrimination is allowed and what is not. Language in the HUD proposed rule purporting to allow religious institutions to "retain [their] independence from federal, state, or local governments" could be misconstrued to suggest that religious institutions are exempt from their non-discrimination laws (as well as other laws such as quality standards). Ambiguity does not resolve the issue. If it is not the Administration's intent to allow discrimination or to overrule state and local non-discrimination laws, the regulations should say so. HUD's failure to clarify these regulations unfortunately suggests that the Administration purposely chose ambiguity so as to leave the door open to discrimination without explicitly saying so.

The Administration has further suggested that some forms of federally-funded religious influence on beneficiaries should be allowed while stating other forms should not be, but these standards regrettably differ from the constitutional standards as defined by decades of jurisprudence by the United States Supreme Court. This lack of clarity leads to unnecessary litigation. Furthermore, depending on what the courts decide, it could lead to discrimination against beneficiaries for their religious beliefs or failure to hold religious beliefs, despite language in the Proposed Rule purporting to protect them.

II. HUD's "Long and Rich History" of Funding Religious Organizations

On July 28, 2001, in compliance with President Bush's Executive Order 13198, HUD prepared *HUD on the R.I.S.E.* The report found:

> "HUD has a long and rich history of cooperating with faith-based and community organizations, particularly with large, national organizations. This experience has developed a body of knowledge and practice that attempted to remain consistent with the trends of Supreme Court decisions on church/state constitutional issues."

HUD on the R.I.S.E. at 15. In a chart giving a case-by-case analysis of religious organizations applying for funding, HUD identified ten cases where a religious organization received funding and only one example where funding was not provided to part of the organization.[1] *HUD on the R.I.S.E.* at 20-21.

[1] On November 7, 1986, the Reagan Administration determined that the Westside Parish Coalition could only receive funding for its day care center and women's employment training program separated from explicitly religious instruction at a religious school and "ministry seminar."

This survey underlines the central point. Under current law and practice at HUD, religious organizations are allowed to receive funding on the same basis as secular organizations. Where agencies have failed to recommend this, their decisions have generally been corrected. We are concerned, however, that the HUD Proposed Rule would give religious organizations the "special right" to ignore laws and Constitutional restrictions that apply to other recipients of federal aid.

III. No Federally-Funded Religious Discrimination

We support the current HUD regulations in all eight of the affected HUD programs that expressly prohibit discrimination against employees and applicants for employment in these programs on the basis of religion. As the non-discrimination provisions in Community Development Block Grants (CDBG) are based on federal statute (42 U.S.C. § 5309(a)) and cannot be overturned by Executive Order or HUD,[2] HUD should clarify in its regulations that this Congressionally-mandated non-discrimination law remains in full force and effect.

As for the other seven programs, the rule is illogical. Since the President has acknowledged that publicly-funded programs cannot contain content that is inherently religious, there is no rational reason to require staff to be discriminated against on a religious basis in implementing these secular programs. Furthermore, as the Constitutionality of direct Federal funding of religiously-discriminatory organizations has not been resolved, we expect the matter to be litigated for many years to come.[3]

Most importantly, this aspect of the Proposed Rule is bad policy. Religious discrimination has served – usually unintentionally – as a proxy for racial and other forms of discrimination. As Dr. Martin Luther King, Jr. observed, the hour of worship is one of the most segregated hours of the week. There are few Orthodox Jews or Southern Baptists who are African-American and few Whites in the African Methodist Episcopal Church or the Nation of Islam While H.R. 7, President Bush's original faith-based bill, expressly prohibited non-religious discrimination on the basis of race, color, national origin, and, to some extent, sex, disability, and age, the proposed HUD rule has none of

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[2] See, e.g. Youngstown v. Sawyer, 343 U.S. 579 (1952) (steel seizure case) (Jackson, J., concurring)(where presidential action is "incompatible with the express or implied will of Congress," Presidential power is at its minimum and the courts can only uphold the measure if it is an exclusive power of the President upon which Congress is unable to act).

[3] The only case extant to address the question of direct federal funding of religious discrimination found the practice to be unconstitutional. Dodge v. Salvation Army, 48 Empl. Prac. Dec. P38,619 (S.D .Miss. 1989) (unpublished). Furthermore, "[i]t is axiomatic that a state may not induce, encourage, or promote private persons to accomplish what it is constitutionally forbidden to accomplish." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492-93 (1989); see also Brentwood Academy v. Tennessee Secondary Sch. Athletic Assoc., ___ U.S. ___, 121 S. Ct. 924 (2001). As government discrimination based on religion is prohibited by both the First Amendment and the Equal Protection Clause, County of Allegheny v. ACLU, 492 U.S. 573, 590 (1989); Burlington National Railroad Co. v. Ford, 504 U.S. 648, 651 (1992), both religious organizations and federal, state, and local governments may be exposed to liability for these violations of constitutional rights.

these protections. The only protections that remain are the complex and sometimes uncertain provisions in current federal law. Thus, with regard to discrimination on bases other than religion, the HUD proposed rule confers *less* legal protections than H.R. 7 did. We believe the Proposed Rule should expressly specify that no one receiving HUD funds is allowed to practice religious or other invidious forms of discrimination, except de minimus exceptions, such as those allowed in the successful Americorps program (namely, pre-existing employees chosen on the basis of religion may remain in service and be financed with federal funds even when a religious institution receives new grants for secular purposes).

A. No Pre-Emption of State and Local Laws

We do not believe that HUD constitutionally has the power to pre-empt state and local laws. Furthermore, the Administration has stated publicly its wish to leave state and local civil-rights laws unaffected. Again, however, without an express statement of the law here, ambiguity, confusion, and substantial litigation is likely to be the result. We believe that the Proposed Rule should be modified to state: "Notwithstanding anything to the contrary herein, nothing in this regulation shall be construed to preempt, supersede, or affect any State or local law or regulation that relates to civil rights or employment discrimination."

B. No Change in Executive Order 11246

Executive Order 11246, prohibiting the Federal Government from discriminating against federal employees, government contractors and subcontractors, and grantees that have construction contracts on the basis of race, creed (religion), color, national origin, or sex, has a long and distinguished history dating back to President Franklin Delano Roosevelt and renowned civil-rights activist A. Philip Randolph.

HUD should rethink its proposal to delete this entire non-discrimination requirement, both because its rationale is plainly incorrect[4] and, more importantly, because the suggested change is illegal. Section 109 of the CDBG Statute (42 U.S.C. § 5309(a)) expressly prohibits such discrimination and should not be overridden by either Executive Order or HUD regulation. The current regulation on the matter, 24 CFR § 570.607(a) ("Grantees shall comply with: (a) Executive Order 11246 as amended . . ."), should remain unmodified.

IV. Protection of Beneficiaries

We support the part of the Proposed Rule that prohibits religious discrimination against beneficiaries of HUD programs and were pleased to see the reiteration of existing

[4] The Proposed Rule states in paragraph 7 on page 649: "By its own terms, the Executive Order [11246] applies to government contractors and subcontractors, not grantees." But this is incorrect: Part III of Executive Order 11246 ("NONDISCRIMINATION PROVISIONS IN FEDERALLY ASSISTED CONSTRUCTION CONTRACTS") expressly applies to grantees in construction contracts.

law in that regard. We request, however, that the Proposed Rule be further clarified so as to ensure that no religious discrimination occurs:

A. Beneficiaries Should Have a Reasonable Secular Alternative

While many of us failed to support H.R. 7, President Bush's original faith-based bill, because of its allowance of federally-funded discrimination, H.R. 7 at least, unlike the Proposed Rule, offered a beneficiary who had "an objection to the religious character of the organization from which the individual receives, or would receive, assistance" an alternative of equal value "that is accessible to the individual and unobjectionable to the individual on religious grounds." Section 1991(g). A similar secular alternative has also been offered to beneficiaries in the new proposed rules by the Department of Health and Human Services on faith-based organizations. HUD should likewise allow beneficiaries a secular alternative, both because it is constitutionally mandated that a beneficiary not have to accept a religious program in order to receive a federally-funded service, Zelman v. Simmons Harris, ___ U.S. ___, 122 S. Ct. 2460 (2002), and because it is good policy.

If there are limited choices in a particular area, the government should not close down programs that serve everyone in order to force beneficiaries to submit to religious activity that is objectionable to them. Beneficiaries should not have to succumb to an undesirable religious program because the alternative is to travel a great distance or wait a long time to obtain the same service. Beneficiaries should be notice of their right to object and their right to an alternative provider, along with a grievance process if the government fails to act properly in this regard. See paragraph F below. All voucher programs have to strictly comply with Zelman.

B. Beneficiaries Should Have True "Voluntary" Choices

The definition of "voluntary" should be clarified. Marvin Olasky, author of Compassionate Conservatism, has quoted an "executive close to the White House" as saying that "voluntary participation for beneficiaries" might include offering food to beneficiaries on the condition that they either hear a short religious sermon after the meal or write a paper on their experience." We do not believe that such an onerous choice as described by Mr. Olasky is truly voluntary. The same services should be offered to all participants without any penalty or hardship based on religious affiliation, belief, practice, or refusal to participate in a religious aspect of a program. Government-funded services should be segregated from religious activity in a coherent manner, so that religious activities are not offered in intermittent but separate segments that would require beneficiaries to either wait for government-funded services to resume or be forced to passively participate in religious activity.

C. Beneficiaries Should Never Be Discriminated Against on the Basis of Their Religion

As currently drafted, the Proposed Rule appears to allow discrimination against beneficiaries when a program is funded by the government indirectly. The regulation

should clearly state that no person receiving services paid for with federal dollars can be discriminated against based on religion, whether the program is operated under a grant or indirectly through vouchers or certificates.

D. Beneficiaries Should Not Be Penalized for Refusal to Hold a Religious Belief

Although the Proposed Rule states that a directly-funded participating organization "shall not, in providing program assistance, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or a religious belief," H.R. 7 additionally prohibited discrimination against a beneficiary for his or her "refusal to hold a religious belief." We would support this change in the Proposed Rule.

E. Beneficiaries Should Not Be Asked their Religious Beliefs

Religious privacy should be respected. We urge a change in the current Proposed Rule to clarify that beneficiaries in these government-funded secular programs should not be asked their religious beliefs.

F. Beneficiaries Should Have a Clear Grievance Process

Unlike H.R. 7, which allowed parties injured by the new law to bring a civil action for injunctive relief to remedy the violation, the Proposed Rule has no provisions to clarify how or where a beneficiary subject to involuntary proselytization or other program restrictions brings a grievance. Without a clear grievance process, the courts will have to create grievance procedures that may differ across jurisdictions and change with time. Unless corrected, the substantial time and money spent on litigation to sort out these ambiguities will tie up the use of HUD grant funds and divert the focus of the state and locality grantees away from core housing and community development activities.

V. Government Should Not Directly Fund Religion

We also disapprove of provisions in the HUD proposed rule that allow the government to directly fund religious instruction, worship, and proselytization in eligible programs when a beneficiary voluntarily "redeems a voucher, coupon, certificate, or similar funding mechanism that was provided to that individual using HUD funds." Even where the beneficiary makes the choice, it is unconstitutional for the government to directly fund religion.

VI. Government Should Not Fund the Partial Building of Houses of Worship

We believe the section of the Proposed Rule allowing federal funds to be "used for the acquisition, construction, or rehabilitation" of structures used "for both eligible and inherently religious activities" as long as the funds do "not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities" should be deleted. First of all, the provision is ambiguous: as "portions . . .

attributable" is not defined, it is not clear if the regulations are referring to square footage of a structure or some other measure.

More importantly, it is unclear what happens if a house of worship decides to expand its religious activities vis-à-vis its secular activities. This provision would lead directly either to the auditing of houses of worship by the government that would be an intrusive burden on religion or the abandonment by government of program standards that would be an unacceptable burden to the government.

While constitutional doctrine is in flux, this provision violates a clear line of Supreme Court decisions that preclude government expenditures for structures that are not "exclusively secular" in their use. See, e.g., Tilton v. Richardson, 403 U.S. 672 (1971); Committee for Public Education v. Nyquist, 413 U.S. 756 (1973); and Hunt v. McNair, 413 U.S. 756 (1973).

Finally, if HUD resources are utilized by local grantees for the construction of houses of worship, this will divert funds that would otherwise be used for critically needed affordable housing, community development, and homeless prevention purposes. At a time when HUD block-grant funding has not kept pace with inflation, while our affordable housing needs continue to grow, a further diminution of HUD funds used for housing and homeless prevention is troubling.

VII. Practical Problems with the HUD Proposal

A. Insufficient Oversight and Enforcement

Although the problem of enforcement is most acute in the complications inherent in funding the construction of houses of worship, it is only a specific example of a more general concern of insufficient oversight and enforcement. The HUD Proposed Rule contains no provisions for oversight or enforcement or clear meaningful penalties for violations of law.

To the extent that limited HUD oversight addresses compliance with rules such as which portions of a church or synagogue are being used for religious activity, this represents a diversion of staff and resources away from the focus on critical program rules, such as the CDBG rules that at least 70% of funds be used for the benefit of low- and moderate-income families and other federally-required objectives. HUD has acknowledged, in response to a written question submitted in last year's House Appropriations hearing on the HUD budget, that in fiscal year 2001 – which, of course, does not include the impact of the new Proposed Rule – HUD monitored less than half of CDBG grantees (states and localities) for compliance with CDBG program requirements.

In that same response, HUD acknowledged

"In cases where a grantee was not able to satisfactorily demonstrate compliance, an appropriate corrective action was requested. Typically, the

corrective action is a reimbursement to the CDBG program account for the CDBG funds expended on the activity with non-Federal funds."

Given the large number of religious organizations and communities receiving funding under CDBG, it does not require a negative view of religious charities to recognize that there will be some abuses and that the penalty of reimbursement is a relatively weak one in terms of discouraging violation of the rules. This is especially true when HUD oversight of an expanding list of program rules will be strained.

B. Delegation of Grant-Making to Religious Intermediaries is Illegal and Subject to Abuse

In Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982), the United States Supreme Court found that the delegation of governmental authority to a religious organization to further determine who receives grants violates the Establishment Clause of the First Amendment and creates the risk that religious intermediaries will not act in a "religiously neutral" manner." Id. At 125; see also Board of Educ. Of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 696-97 (1994).

We have seen this principle misused in practice. In the last Congress, the $30 million Compassionate Capital Fund was broadly supported for the purpose of teaching charitable organizations how "to emulate model social service programs and to encourage research on the best practices of social service organizations." However, officials from Operation Blessing, a religious intermediary chaired by Pat Robertson and a recipient of $500,000 from the fund, were reported by the *Washington Post* to say they will use the money to help 120 local organizations coordinate programs and "gain increased access to corporate and institutional donors." (October 3, 2002, p. A2). It seems unlikely that Mr. Robertson's organization will pass on federal funding to grantees whose religious principles fundamentally conflict with his own.

The Proposed Rule should clarify that religious intermediaries are subject to the same restrictions and standards as direct grantees and prohibit the government's delegation to religious organizations the decision as to which grantees should receive federal funds.

VII. Conclusion

As Congressman Bobby Scott has put it: "Charitable choice is a solution in search of a problem." Under current law, hundreds of religious charities have received billions of dollars to fund HUD programs, with few instances of existing barriers. Even HUD identified the primary remaining barrier to more extensive federal funding of religious charities to be the Constitution of the United States, as defined by the United States Supreme Court, and the regulations HUD has developed to comply with these rulings.

The proposed HUD rule has many similarities to H.R. 7, President Bush's original faith-based proposal. Like H.R. 7, the primary change in the law accomplished by the Proposed Rule is to give religious organizations a "special right" not afforded other federal grantees: the right to discriminate in employment with federal funds.

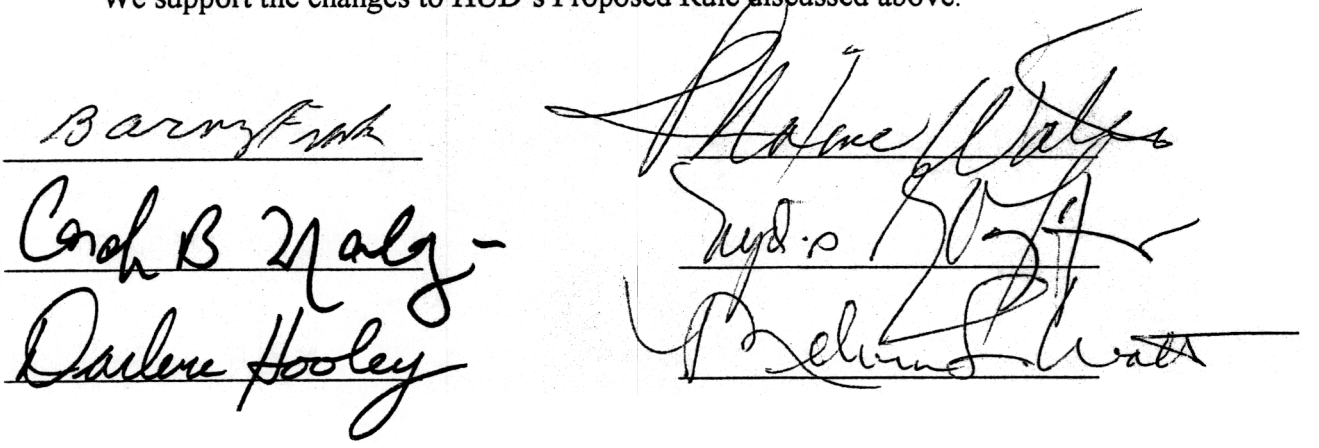
Like H.R. 7, some of the HUD proposal restates and clarifies current law that, for example, religious symbols and names should not disqualify an organization from federal funding and that beneficiaries should not be discriminated against. These matters, to the extent they pose a problem, can be and are being corrected under existing regulations.

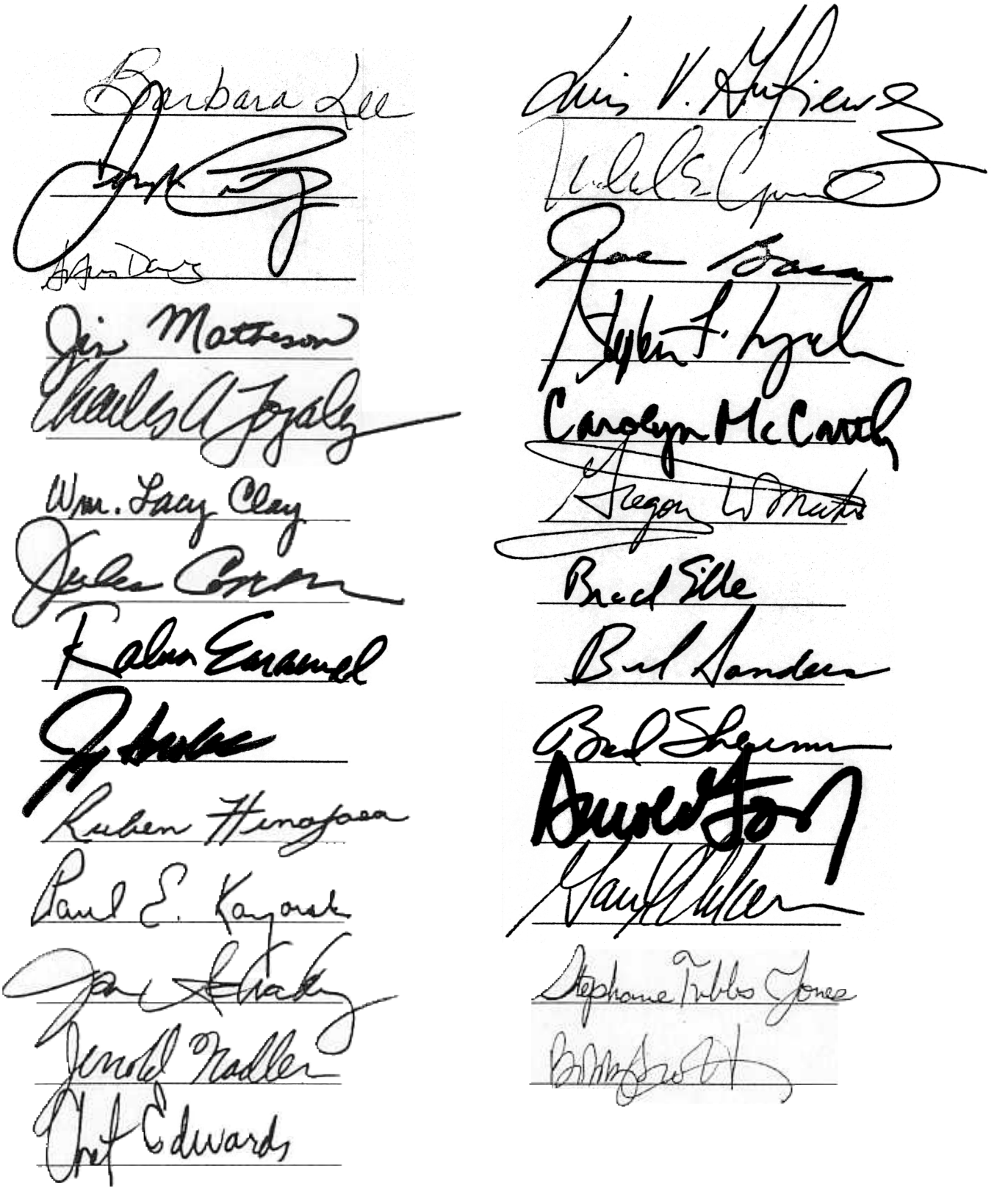
In other respects, however, the HUD rule is more ambitious and more ambiguous than H.R. 7. Unless the Administration clarifies these ambiguities, the Proposed Rule will likely be the subject of extensive litigation until it can be determined what it means (e.g., on issues like pre-emption of state and local non-discrimination law) and what parts of it do not violate existing law. As drafted, the rule appears to conflict both with current federal anti-discrimination statutes and the church/state jurisprudence of the United States Supreme Court.

Fundamental questions abound. The Proposed Rule does not contain some of the constitutional protections in H.R. 7 (such as procedures to provide beneficiaries with secular alternatives and specific auditing and enforcement procedures), it attempts to change the constitutional standards, and it adds a new constitutional problem not found in H.R. 7: federally funding portions of the cost of constructing houses of worship.

The likely result of these ambiguous regulations and the various statutory and constitutional questions they raise is a welter of uncertain rules and conflicting court decisions taking place in various parts of the country until each issue is finally determined many years from now by the United States Supreme Court. In the meantime, the "Inconsistent Regulation" and "Lack of Clear Policy and Direction" complained of in *HUD on the R.I.S.E.* (at 25-26) will almost certainly increase rather than decrease by virtue of HUD's proposal. When all is said and done and millions in litigation costs have been expended by religious organizations on clarifying these ambiguities and close statutory and constitutional questions, it seems unlikely that religious charities will be in a better position under the Proposed Rule than they are now.

We support the changes to HUD's Proposed Rule discussed above.





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